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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SCOTT LEWIS KING, Defendant and Appellant.	B288298 (Los Angeles County Super. Ct. No. GA085329)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael D. Carter, Judge. Affirmed and remanded with directions.

Jin H. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Acting Senior Assistant Attorney General, Steven D. Matthews and Heidi Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

Scott Lewis King appeals the judgment entered following a jury trial in which he was convicted of first degree murder. (Pen. Code,[1] § 187, subd. (a).) The jury also found true the gang allegation pursuant to section 186.22, subdivision (b)(1)(C) and three firearm allegations pursuant to section 12022.53, subdivisions (b), (c) and (d). The trial court found appellant had suffered a prior serious felony conviction for robbery, which qualified as a strike under the Three Strikes law (§§ 667, 1170.12), but the court granted appellant's *Romero*[2] motion to dismiss the strike.

The trial court sentenced appellant to 55 years to life in state prison. The sentence consisted of 25 years to life for the first degree murder conviction, plus a consecutive term of 25 years to life for the firearm enhancement under Penal Code section 12022.53, subdivision (d),[3] and an additional five-year term pursuant to section 667, subdivision (a)(1) for the prior serious felony conviction. The court imposed a $300 restitution fine (Pen. Code, § 1202.4, subd. (b)), imposed and stayed a $300 parole revocation fine (Pen. Code, § 1202.45), and ordered a $30 criminal conviction assessment (Gov. Code, § 70373), and a $40 court security fee (Pen. Code, § 1465.8).

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[1] Undesignated statutory references are to the Penal Code.

[2] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

[3] The court also imposed and stayed a 10-year term under section 12022.53, subdivision (b) and a 20-year term under section 12022.53, subdivision (c). In addition, the court imposed and permanently stayed a 10-year term under section 186.22, subdivision (b)(1)(C).

Appellant contends: (1) The trial court violated appellant's federal and state due process rights by instructing the jury pursuant to CALCRIM No. 315 that it should consider the witness's degree of certainty in evaluating the accuracy of an identification; (2) The trial court prejudicially erred in denying appellant's request for a voluntary manslaughter instruction based on imperfect self-defense; (3) The trial court abused its discretion in refusing to strike the firearm enhancement; and (4) Appellant is entitled to remand for a determination of his ability to pay the restitution and parole revocation fines, the court securities fee, and the criminal conviction assessment. We reject these contentions and affirm the judgment of conviction. However, remand is necessary to permit the trial court to exercise its discretion pursuant to Senate Bill No. 1393[4] to impose or strike the serious felony enhancement imposed under section 667, subdivision (a)(1). In addition, the trial court is directed to correct the minutes of the February 21, 2018 probation and sentencing hearing and the abstract of judgment to accurately reflect the court's oral pronouncements.

FACTUAL BACKGROUND

1. Marvin Laguan's murder

On the evening of August 22, 2011, appellant was at his cousin's house on Mar Vista Avenue in Pasadena with Steven Fleming, Maurice Scudder, and Ricky Vaughns. After leaving the cousin's house, the four men walked south on Mar Vista together, but when they reached Villa Street, Fleming told Scudder, " 'Just go to Brandy's [*sic*] house. We going to come over

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[4] Statutes 2018, chapter 1013, section 2.

there. I'll meet you over there. We're about to go do something.' " Appellant and Fleming continued walking down Mar Vista toward Maple, but feeling something was "fishy" and "weird," Scudder waited at the corner of Villa and Mar Vista and watched to see where they were going and if they were going to return.

In the meantime, around 9:00 p.m. Cynthia Carrier drove to Mar Vista to pick up her boyfriend, Marvin Laguan, at his friend's apartment located on the east side of the street between Villa and Maple. With her three-year-old son in the backseat, Carrier parked on the west side of the street and remained in the car as she waited for Laguan. Laguan came outside and leaned into the driver's side window to speak with her. As they chatted, Carrier saw Laguan look over his shoulder and look at appellant, who was slowly walking down the east side of Mar Vista toward Maple. Appellant was wearing a dark shirt and a dark unzipped hoodie sweatshirt with the hood pulled up over his head. Appellant stopped and stood in the driveway of the apartment from which Laguan had just come. As the two men eyed each other, Laguan said, " 'What's up?' " to appellant. Carrier could not hear appellant's response. Appellant continued to stare at Laguan, making him uncomfortable and irritated, which prompted Carrier to urge Laguan to hurry up and say goodbye to his friends so they could leave.

Laguan turned and started to walk across the street toward his friend's apartment. His hands were at his sides and he was wearing a short-sleeved T-shirt. He did not have any weapon, and he made no threatening or aggressive gestures toward appellant. As he drew closer to appellant, Laguan said, " 'Where you from?' " in a nonthreatening manner. Suddenly appellant pulled a revolver from the pocket of his sweatshirt and opened

fire, shooting Laguan multiple times. Laguan turned around and tried to walk back to Carrier's car. He went to his knees as appellant continued to shoot him. When he had stopped firing, appellant ran down Mar Vista toward Maple. Carrier managed to get Laguan into the backseat of her car and called 911.

Cynthia Dale and her boyfriend Oliver Debats were sitting on their elevated porch facing Mar Vista at the corner of Maple when they heard gunshots. Debats first saw appellant near Carrier's car. After the shooting Dale and Debats saw appellant and another man run south on Mar Vista past their porch and turn west on Maple. The hood of appellant's sweatshirt had come off his head, and he was running awkwardly with his hands in his pockets. As appellant ran past, Dale made eye contact with him, and saw him "dead on."[5] At trial, both Dale and Debats identified appellant as the man wearing the hoodie. Dale testified she was "very confident" in her identification.

When Scudder heard the gunshots he ran west on Villa to Brandi's apartment, which was on Wilson one block west of Mar Vista between Villa and Maple. After the shooting, surveillance footage from a residence on Wilson showed two figures run from Villa into the rear of an apartment building on Wilson. Three to five minutes after Scudder arrived at Brandi's apartment, appellant and Fleming rushed in, nervous and out of breath. They ran to the back of the apartment, and dashed back and

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[5] At the preliminary hearing of King and his codefendant, Steven Fleming, as well as at Fleming's trial in September 2014, Dale identified Fleming as the man with whom she made eye contact.

forth in and out of the bathroom. Scudder saw that appellant and Fleming had taken a revolver apart and were putting the parts in a towel. Appellant passed the cylinder to Fleming.

Laguan died due to multiple gunshot injuries. He suffered 10 gunshot wounds, two of which were fatal. Five projectiles, consistent with the .22 long rifle caliber ammunition used in 10-round revolvers, were recovered from Laguan's body. No bullets or casings were found at the scene, and police never recovered a gun.

2. Gang evidence

Corporal Carlo Montiglio of the Pasadena Police Department testified as the prosecution's gang expert. The expert explained that the "Pasadena Denver Lanes Bloods" is a Bloods gang based in Pasadena known by its initials "PDL." As a Bloods gang, PDL associates with the color red, and its members commonly call each other "Blood." The chief rival of any Bloods gang is a Crips gang, and Bloods gang members often change the "C" in words to a "B" as a sign of disrespect to the Crips. Thus, in written or oral speech, Bloods gang members commonly say words like "bool" for "cool," or "bristol meth" for "crystal meth." In Bloods gang graffiti and tattoos a "K" may be placed after a "C" in a word to signify "Crip Killer."

Among PDL's rivals in Pasadena are the "Squiggly Lane Gangster Bloods" and the "Villa Boys Pasadena Trece" gang (Villa Boys). In 2011, PDL and the Villa Boys were engaged in a violent conflict which involved several shootings and murders. Montiglio testified that although the area around Mar Vista and Villa was Villa Boys gang territory, PDL controlled a small section of that area on Mar Vista just north of Villa.

Montiglio identified several of appellant's tattoos as probable PDL gang tattoos. On November 6, 2008, appellant admitted to writing PDL gang graffiti and his moniker "Do Wrong" on a Pasadena bus. Appellant also admitted to a police officer that he was a gang member.

Based on the gang graffiti, appellant's gang tattoos, his gang admission, his regular association with PDL gang members, and his frequent use of gang vernacular in his recorded jail conversations as well as his Facebook messages and postings, Montiglio opined appellant was a member of the Pasadena Denver Lanes Bloods. When presented with a hypothetical scenario based on the facts of the Laguan murder, Montiglio further opined that the murder was committed for the benefit of, at the direction of, or in association with the PDL gang.

DISCUSSION

I. CALCRIM No. 315

Appellant contends the trial court denied his due process rights by instructing pursuant to CALCRIM No. 315 that a witness's level of certainty is a factor to consider in evaluating the accuracy of identification testimony. He argues that this portion of the instruction is contrary to empirical studies that show witness certainty has no correlation with accuracy and is legally incorrect. This precise issue is currently pending before the California Supreme Court in *People v. Lemcke*, review granted October 10, 2018, S250108 (*Lemcke*).

CALCRIM No. 315 directs the jury in evaluating eyewitness identification testimony to consider a number of questions, including, "How certain was the witness when he or she made an identification?" Respondent contends appellant forfeited any challenge to the instruction by failing to object. The

predecessor to CALCRIM No. 315 is CALJIC No. 2.92, which tells the jury to consider any factor that "bear[s] upon the accuracy of the witness' identification of the defendant, including, . . . [¶] . . . [¶] [t]he extent to which the witness is either certain or uncertain of the identification." At the time of trial in this case, the California Supreme Court had upheld the inclusion of the certainty factor in CALJIC No. 2.92 on at least two occasions. (*People v. Sánchez* (2016) 63 Cal.4th 411, 461–463 (*Sánchez*); *People v. Johnson* (1992) 3 Cal.4th 1183, 1231–1232; see also *People v. Wright* (1988) 45 Cal.3d 1126, 1144 [upholding CALJIC No. 2.92 in its entirety, including the certainty factor].) Given this precedent we reject respondent's forfeiture argument as any objection to the certainty factor in CALCRIM No. 315 would have been futile. (See *People v. Penunuri* (2018) 5 Cal.5th 126, 166; *People v. Anderson* (2001) 25 Cal.4th 543, 587 ["Counsel is not required to proffer futile objections"].)

However, the same precedent mandates that we reject appellant's claim on its merits. In approving the use of certainty as a factor in evaluating eyewitness identifications, our Supreme Court has explained: "Studies concluding there is, at best, a weak correlation between witness certainty and accuracy are nothing new. We cited some of them three decades ago to support our holding that the trial court has discretion to admit expert testimony regarding the reliability of eyewitness identification. [Citation.] In *People v. Wright* (1988) 45 Cal.3d 1126, 1141, we held 'that a proper instruction on eyewitness identification factors should focus the jury's attention on facts relevant to its determination of the existence of reasonable doubt regarding identification, by listing, in a neutral manner, the relevant factors supported by the evidence.' We specifically approved

CALJIC No. 2.92, including its certainty factor. (*Wright*, at pp. 1144, 1166.) We have since reiterated the propriety of including this factor. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1231–1232.)" (*Sánchez, supra*, 63 Cal.4th at p. 462.)

Our Supreme Court is now considering whether the certainty factor as articulated in CALCRIM No. 315 remains valid. In its grant of review in *Lemcke*, the high court framed the issue as follows: "Does instructing a jury with CALCRIM No. 315 that an eyewitness's level of certainty can be considered when evaluating the reliability of the identification violate a defendant's due process rights?" (<https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2257737&doc_no=S250108&request_token=NiIwLSEmXkw8W1BBSCItUE5IMFw0UDxTJiJeQzpRMCAgCg%3D%3D> [as of Apr. 15, 2020], archived at <https://perma.cc/S4TU-2U6R>.) Appellant urges us to anticipate the Supreme Court's invalidation of CALCRIM No. 315 to the extent it encourages the jury to consider a witness's certainty in making an identification. *Sánchez*, however, remains good law. Unless and until the Supreme Court changes that law, we are bound by its holding that including the certainty factor in instructions on eyewitness identification is not error. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

II. The Trial Court Properly Refused Appellant's Request for a Voluntary Manslaughter Instruction Based on Imperfect Self-Defense

A. *Proceedings below*

During discussions about the jury instructions, appellant requested CALCRIM No. 571, voluntary manslaughter based on

imperfect self-defense. Appellant asserted the instruction was warranted because Laguan had threatened appellant with immediate harm by issuing the gang challenge, "Where you from?" According to appellant, it was a question for the jury whether Laguan initiated the shooting with this challenge and if appellant had a reasonable belief the immediate use of force was necessary to confront such a challenge in rival gang territory. The court responded that the instruction required evidence that " 'the defendant actually believed that the immediate use of force was necessary to defend himself.' " "[T]here has to be evidence of actual belief, not [that the defendant] could have believed it or he should have believed it. . . . I don't think you get that from the gang expert saying this is what gang members believe, especially with the fact that the defense is contesting the fact he was a gang member at all." Although it would allow counsel to revisit the issue, the court warned it would require a showing of appellant's actual belief.

In renewing the request for the imperfect self-defense instruction, the defense argued the evidence showed that a reasonable person could conclude appellant was actually in fear of attack. The court refused the instruction, stating that evidence of a defendant's actual belief in the need to defend against an imminent danger was a prerequisite for the instruction.

B. *Legal principles*

" 'Murder is the unlawful killing of a human being . . . with malice aforethought.' (§ 187, subd. (a).) 'Manslaughter is the unlawful killing of a human being without malice.' (§ 192, subd. (a).) Manslaughter is a lesser included offense of murder, and a defendant who commits an intentional and unlawful killing

but who lacks malice is guilty of voluntary manslaughter." (*People v. Nelson* (2016) 1 Cal.5th 513, 538 (*Nelson*); *People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).)

Imperfect self-defense reduces murder to voluntary manslaughter (*People v. Soto* (2018) 4 Cal.5th 968, 970) because when a defendant kills under the actual but unreasonable belief that he is " 'in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice.' " (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1048 (*Nguyen*); *People v. Simon* (2016) 1 Cal.5th 98, 132 (*Simon*).) As our Supreme Court has explained, imperfect self-defense is a shorthand way of describing one form of voluntary manslaughter; it is not an affirmative defense. (*Simon*, at p. 132.) Thus, in light of the fact that "imperfect self-defense reduces an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice, this form of voluntary manslaughter is considered a lesser and necessarily included offense of murder." (*Ibid.*; *Breverman*, *supra*, 19 Cal.4th at p. 154.)

It is settled that in a criminal case, even absent a request, "a trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence. [Citation.] It is error for a trial court not to instruct on a lesser included offense when the evidence raises a question whether all of the elements of the charged offense were present, and the question is substantial enough to merit consideration by the jury." (*People v. Booker* (2011) 51 Cal.4th 141, 181; *Breverman*, *supra*, 19 Cal.4th at p. 154.)

However, " '[a]n instruction on a lesser included offense must be given only if there is substantial evidence from which a jury could reasonably conclude that the defendant committed the

lesser, uncharged offense, but not the greater, charged offense.' " (*Nelson*, *supra*, 1 Cal.5th at p. 538.) "The 'substantial evidence requirement is not satisfied by " '*any* evidence . . . no matter how weak' " ' " (*ibid.*), and "[s]peculative, minimal, or insubstantial evidence is insufficient to require an instruction on a lesser included offense" (*Simon*, *supra*, 1 Cal.5th at p. 132). "We review de novo a trial court's decision not to give an imperfect self-defense instruction." (*Id.* at p. 133; *People v. Souza* (2012) 54 Cal.4th 90, 113.)

" '[J]ust as with perfect self-defense or any defense, "[a] trial court need give a requested instruction concerning [imperfect self-defense] *only if there is substantial evidence to support the defense*." ' " (*Nguyen*, *supra*, 61 Cal.4th at p. 1049.) Accordingly, there must be substantial evidence that, when the defendant acted, he *actually believed* (1) that he was in imminent danger of being killed or suffering great bodily injury, *and* (2) that the immediate use of deadly force was necessary to defend against that danger, but (3) at least one of those beliefs was unreasonable. (CALCRIM No. 571; *People v. Her* (2009) 181 Cal.App.4th 349, 352.)

Our Supreme Court has cautioned that the doctrine of imperfect self-defense "is a ' "narrow" ' one and 'will apply only when the defendant has an actual belief in the need for self-defense and only when the defendant fears immediate harm that ' " '*must be instantly dealt with*.' " ' " (*People v. Landry* (2016) 2 Cal.5th 52, 98.) "To satisfy the imminence requirement, '[f]ear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury. " '[T]he peril must appear to the defendant as

immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with*.' . . . [¶] . . ." Put simply, the trier of fact must find an *actual* fear of an *imminent* harm.' (*In re Christian S.* (1994) 7 Cal.4th 768, 783.)" (*People v. Trujeque* (2015) 61 Cal.4th 227, 270–271 (*Trujeque*).)

C. *The trial court was under no duty to instruct on imperfect self-defense*

The trial court properly refused to instruct the jury on imperfect self-defense in this case because there was no evidence that appellant actually believed he was in any danger of immediate harm that had to be dealt with instantly.

Appellant himself did not testify, but relies on Carrier's testimony about the shooting and the prosecution gang expert's testimony about gang culture to argue that there was substantial evidence of appellant's belief that he was in imminent peril to which he needed to respond with deadly force. Specifically, appellant cites the prosecution gang expert's testimony that the question, "Where you from?" is a "form of intimidation" that gang members and those who live in communities with gangs understand as a challenge. Such a challenge could lead to violence—anything from a fight to serious injury or death. Appellant then points to Carrier's testimony that Laguan repeatedly turned his attention from his conversation with Carrier to look over at appellant. As Laguan walked toward appellant, he said, "What's up," and, escalating the situation, he then asked appellant, "Where you from?" Appellant adds that Laguan was very close to appellant—about six feet away—when appellant responded to Laguan's aggression by opening fire.

Appellant also argues that the jury could have reasonably inferred that appellant subjectively feared he was in imminent danger of great bodily injury or death which called for the use of deadly force based on Montiglio's testimony that walking through a rival gang's territory is a sign of great disrespect, which can be deadly for a member of another gang. According to Montiglio, retaliation for disrespect can consist of "[a]nything as simple as beatings all the way to murders." Appellant thus asserts that because he was walking through the rival gang Villa Boys territory, he "reasonably would have had a heightened sense of the possibility that danger might come his way."

While appellant identifies what might have amounted to a potentially dangerous situation, he fails to cite any evidence showing appellant's subjective state of mind, much less even a suggestion that appellant was in " '*actual* fear of an *imminent* harm' " which called for the use of deadly force. (*Trujeque*, *supra*, 61 Cal.4th at p. 270.) It is true that "the 'substantial evidence of a defendant's state of mind may be found in the testimony of witnesses other than a defendant' " (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 82), but such evidence is lacking here. No witness testified that appellant fired on Laguan out of fear or appeared fearful in any way. There was no evidence of any words or statements by appellant in the moments before the shooting, nor evidence of anything he said after the killing to indicate he believed deadly force was necessary to defend himself against an immediate threat posed by Laguan.

In the absence of such evidence to support this element of the voluntary manslaughter instruction, the trial court was under no duty to instruct on imperfect self-defense, and properly declined to do so.

III. The Trial Court Did Not Abuse Its Discretion in Refusing to Strike the Firearm Allegation

A. *Proceedings below*

The jury found true all three firearm enhancement allegations under section 12022.53, subdivisions (b), (c), and (d). At sentencing, appellant requested dismissal of the firearm enhancement under section 12022.53, subdivision (d), which carried a consecutive term of 25 years to life. The trial court declined the request, stating: "[T]he court recognizes that it does have the discretion to strike either the allegation as a whole or punishment for the allegation; and in this case, the court in its discretion chooses to do neither." The court specifically found that appellant "fall[s] within the spirit of the gun allegation," and explained in detail how appellant's use of the firearm in this instance made it "so easy" to shoot and kill a stranger from a distance with no provocation or even interaction between them. The court noted that had another type of weapon been used, Laguan might "have had a fighting chance to survive," but because appellant used a firearm, Laguan really had no opportunity to defend himself and no chance of survival. On that basis, the court imposed a consecutive term of 25 years to life pursuant to section 12022.53, subdivision (d).

B. *The Trial Court Properly Exercised Its Discretion*

Appellant contends the trial court abused its discretion in declining to strike the firearm enhancement because it failed to consider the nature and circumstances of his current crimes and prior convictions, and the particulars of his background, character, and prospects. (See *People v. Williams* (1998) 17 Cal.4th 148, 161.) Instead, according to appellant, by relying on irrelevant factors while ignoring relevant ones, the court did not

exercise "informed discretion" and the matter must be remanded for resentencing. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391 [" 'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court' "].) We reject the claim.

In *People v. Pearson* (2019) 38 Cal.App.5th 112 (*Pearson*), our colleagues in Division One of this district resolved this issue, noting that when determining whether to strike a firearm enhancement under section 12022.53, subdivision (h) the trial court must weigh the same factors it must consider when pronouncing sentence in the first instance. (*Id.* at p. 117.) "In addition to the factors expressly listed for determining whether to strike enhancements listed in California Rules of Court, rule 4.428(b), the trial court is also to consider the factors listed in California Rules of Court, rule 4.410 (listing general objectives in sentencing), as well as circumstances in aggravation and mitigation under California Rules of Court, rules 4.421 and 4.423. '[U]nless the record affirmatively reflects otherwise,' the trial court is deemed to have considered the factors enumerated in the California Rules of Court. (Cal. Rules of Court, rule 4.409.) Among other factors the court may have considered were that '[t]he crime involved great violence . . . threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness,' that the 'defendant was armed with or used a weapon at the time of the commission of the crime,' and that the 'victim was particularly vulnerable.' (Cal. Rules of Court, rule 4.421(a)(1)–(3).)" (*Ibid.*)

Here, by highlighting the fact that appellant used a firearm to shoot a perfect stranger from a distance without even interacting with him and without provocation, the court expressly

determined that "[t]he crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness" and "[t]he defendant has engaged in violent conduct that indicates a serious danger to society." (Cal. Rules of Court, rule 4.421(a)(1), (b)(1).) The court further took into account the victim's particular vulnerability by noting that Laguan had had no opportunity to defend himself and did not stand a "fighting chance to survive." (Cal. Rules of Court, rule 4.421(a)(3).) And in finding that the murder was committed with a firearm, the court explicitly determined "[t]he defendant was armed with or used a weapon at the time of the commission of the crime." (Cal. Rules of Court, rule 4.421(a)(2).)

Moreover, there is nothing in the record to indicate, much less affirmatively establish that the trial court did not consider other relevant factors it was required to consider. (Cal. Rules of Court, rule 4.409 ["Relevant factors enumerated in these rules must be considered by the sentencing judge, and will be deemed to have been considered unless the record affirmatively reflects otherwise"]; see *Pearson*, *supra*, 38 Cal.App.5th at p. 117.)

It is readily apparent on this record that the trial court carefully considered the factors it was required to consider when pronouncing sentence in this case, and its denial of appellant's request to dismiss the firearm enhancement "was squarely within the bounds of the trial court's discretion." (*Pearson*, *supra*, 38 Cal.App.5th at p. 118.)

IV. Appellant Is Not Entitled to a Hearing to Determine His Ability to Pay the Fines Assessments

Appellant contends the trial court's imposition of restitution and parole revocation fines as well as the criminal conviction assessment and the court security fee was unconstitutional under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). He thus asserts he is entitled to remand with instructions to stay enforcement of these financial obligations until the People prove that he has the ability to pay them. We reject the claim.

In *People v. Hicks* (2019) 40 Cal.App.5th 320, 322, 329, review granted November 26, 2019, S258946[6] (*Hicks*), we concluded that *Dueñas* was wrongly decided, and we rejected its holding that "due process precludes a court from 'impos[ing]' certain assessments and fines when sentencing a criminal defendant absent a finding that the defendant has a 'present ability to pay' them." (Accord, *People v. Petri* (2020) 45

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[6] The California Supreme Court ordered briefing deferred pending decision in *People v. Kopp*, S257844, which presents the following issues:

"(1) Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments? (2) If so, which party bears the burden of proof regarding the defendant's inability to pay?" (*People v. Hicks*, S258946, <https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2302457&doc_no=S258946&request_token=NiIwLSEmXkw8W1BZSCNNTEtIUEQ0UDxTJiBeIz5SUCAgCg%3D%3D> [as of Apr. 15, 2020], archived at <https://perma.cc/G7TN-VLGH>.)

Cal.App.5th 82, 92 [quoting *Hicks*, at p. 329: "The 'imposition of these financial obligations has not denied defendant access to the courts' and 'their imposition has [not] . . . result[ed] in defendant's incarceration' "]; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067–1068 ["*Dueñas* was wrongly decided"]; *People v. Caceres* (2019) 39 Cal.App.5th 917, 923, 926–927 [*Dueñas*'s due process analysis does not justify extending its "broad holding" beyond its "extreme facts"]; *People v. Kingston* (2019) 41 Cal.App.5th 272, 279–282 (*Kingston*) [no due process violation in imposition of assessments and restitution fine without first ascertaining defendant's ability to pay them]; *People v. Kopp* (2019) 38 Cal.App.5th 47, 96–97 ["there is no due process requirement that the court hold an ability to pay hearing before imposing a punitive fine and only impose the fine if it determines the defendant can afford to pay it"], review granted Nov. 13, 2019, S257844.)

In *Kingston*, our colleagues in Division One of this district agreed with our opinion in *Hicks* that, contrary to *Dueñas*'s analysis, "due process precludes a court from imposing fines and assessments only if to do so would deny the defendant access to the courts or result in the defendant's incarceration." (*Kingston*, *supra*, 41 Cal.App.5th at p. 279, citing *Hicks*, *supra*, 40 Cal.App.5th at p. 329.) Here, as in *Kingston* and *Hicks*, the "imposition of the [restitution fine], assessments and fees in no way interfered with [appellant's] right to present a defense at trial or to challenge the trial court's rulings on appeal . . . . And their imposition did not result in [appellant's] incarceration." (*Kingston*, at p. 281; *Hicks*, at p. 329.) Moreover, due process does not deny appellant the opportunity to try to satisfy these obligations. (See *Hicks*, at p. 327.)

Further, we agree with the People that appellant's failure to object to the imposition of the restitution fine or assessments and his failure to assert any inability to pay them (unlike the defendant in *Dueñas*) forfeited the issue on appeal. Generally, where a defendant has failed to object to a restitution fine or court fees based on an inability to pay, the issue is forfeited on appeal. (*People v. Aguilar* (2015) 60 Cal.4th 862, 864 ["defendant's failure to challenge the fees in the trial court precludes him from doing so on appeal"]; *People v. Avila* (2009) 46 Cal.4th 680, 729.) We agree with our colleagues in Division Eight of this district that this general rule applies here to the restitution fine and the assessments imposed under the Penal and Government Codes. (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155; but see *People v. Petri*, *supra*, 45 Cal.App.5th at pp. 88–89; *People v. Castellano* (2019) 33 Cal.App.5th 485, 488.)

Finally, even if appellant did not forfeit his argument, we decline to extend *Dueñas*'s broad holding beyond the extreme facts in that case, which are not present here. Dueñas was a disabled, unemployed, and often homeless mother of two young children. Over the course of several years she served jail time because she could not pay the fines imposed in connection with various misdemeanor vehicle offenses. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1160–1162.) Applying a due process analysis to the particular facts before it, the appellate court concluded that "[b]ecause the only reason Dueñas cannot pay the fine and fees is her poverty, using the criminal process to collect a fine she cannot pay is unconstitutional." (*Dueñas*, at p. 1160.) By contrast, the situation in which appellant finds himself—subject to a state prison sentence of 55 years to life on a first-degree

murder conviction with a firearm enhancement—simply does not implicate the same due process concerns at issue in the factually unique *Dueñas* case. Appellant, unlike Dueñas, does not face incarceration because of an inability to pay court-imposed fines, fees and assessments. Instead, appellant is in prison because he committed a deliberate and premeditated murder. Even if appellant does not pay the fines and assessments, he will suffer none of the cascading and potentially devastating consequences that Dueñas faced. (See *Dueñas*, at p. 1163.)

V. Remand Is Necessary to Permit the Trial Court to Exercise Its Discretion to Determine Whether to Strike the Five-year Enhancement for the Prior Serious Felony Conviction

Appellant's sentence includes a five-year enhancement imposed under section 667, subdivision (a)(1) for a prior serious felony conviction.

Senate Bill No. 1393, which amended sections 1385 and 667 to give trial courts the discretion to strike the five-year enhancement under section 667, subdivision (a)(1), became effective on January 1, 2019, after appellant was sentenced in this case. The legislation applies retroactively to cases in which judgment is not yet final on appeal. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973 [holding Sen. Bill No. 1393 would apply retroactively upon effective date]; see *People v. Brown* (2012) 54 Cal.4th 314, 323 ["[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date"], fn. omitted.)

Prior to Senate Bill No. 1393, section 1385, subdivision (b), expressly prohibited a trial court from striking " 'any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.' " (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045, fn. 2; *Valencia*, at p. 1045 [under § 1385, subd. (b), trial court has no discretion to strike § 667, subd. (a) enhancement].) Senate Bill No. 1393 eliminated this restriction.

In the context of Senate Bill No. 620, courts have held that remand is required absent a clear indication that the trial court would *not* have reduced the sentence if it had been aware of its discretion to do so. (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.) The trial court gave no such indication here. To the contrary, given that the court granted appellant's request to strike the prior conviction pursuant to *Romero* and thus not double appellant's sentence under the Three Strikes law, the record suggests the court may choose to exercise its discretion in favor of leniency on this matter as well. Accordingly, on remand the trial court may consider whether to exercise its discretion to impose or strike the five-year prior serious felony enhancement under section 667, subdivision (a)(1).

VI. The Trial Court Is Directed to Correct the Minutes and Abstract of Judgment to Conform to the Trial Court's Oral Pronouncements

At the sentencing hearing in this case, the trial court sentenced appellant to an aggregate term of 55 years to life and imposed a $300 restitution fine (§ 1202.4, subd. (b)) and a $300 parole revocation fine, which was stayed (§ 1202.45). The trial court further ordered that appellant and Fleming be held jointly and severally liable for victim restitution in the amount determined for the burial expenses.

However, the minute order from the hearing incorrectly reflects imposition of a probation revocation restitution fine, effective upon the revocation of probation pursuant to section 1202.44. The abstract of judgment contains several errors and omissions as well: It does not reflect the indeterminate sentence of 50 years to life plus five years imposed by the court, but instead shows only 25 years to life for the firearm enhancement under section 12022.53, subdivision (d) plus five years for the prior serious felony conviction enhancement under section 667, subdivision (a)(1), and it omits the 25 years to life sentence for murder altogether; the abstract fails to reflect that the court ordered joint and several liability between appellant and Fleming for victim restitution; and, like the minutes, the abstract fails to reflect that the court imposed and stayed a $300 parole revocation fine under section 1202.45, but incorrectly shows a $300 probation revocation fine "now due" under section 1202.44.

"Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3; see also *People v. Jones* (2012) 54 Cal.4th 1, 89 [" '[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize' "].) Discrepancies between the judgment as orally pronounced and as entered in the minutes or abstract of judgment are presumed to be the result of clerical error (*People v. Mesa* (1975) 14 Cal.3d 466, 471), and an appellate court that has properly assumed jurisdiction of a case has the inherent authority to correct clerical errors in the record to

conform to the oral judgment of the sentencing court (*People v. Mitchell* (2001) 26 Cal.4th 181, 185). Accordingly, the minutes of the February 21, 2018 probation and sentencing hearing and the abstract of judgment must be corrected to conform to the trial court's oral pronouncement of judgment.

DISPOSITION

The matter is remanded to the trial court for the limited purpose of allowing it to exercise its discretion under Penal Code sections 667, subdivision (a) and 1385, as amended by Senate Bill No. 1393, to strike or impose the five-year prior serious felony enhancement. The trial court is further directed to correct the minutes and abstract of judgment to reflect the court's oral pronouncements and to forward a certified copy of the abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.